



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.272 OF 1998

(From Original Conviction and Sentence in Criminal Case No.3556 of 1997 of the Chief Magistrate's Court at Mombasa – Jo-Anne Siganga, Ms – S.R.M.)

TOM MBOYA ODONGO.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was originally charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. He was convicted and sentenced to death. He appeals against the conviction and sentence.

The facts of the case narrated by the prosecution are that the complainant, Robert Wanyama, PW.1 was sleeping in his house on the night of 14th/15th October, 1997 when at 9 p.m. two robbers forced their way into his house using a stone which crashed the main door. The robbers who were armed with pangas, steel bars, arrows and who held a torch, ordered the complainant to lie beneath the bed and threatened him with death. He obeyed them. They then proceeded to steal his radio cassette, two bed sheets, one wall clock and cash amount of Kshs.3,400/- before escaping. The complainant reported the incident to Diani Police Station where he recognized one of the robbers. On 21.10.97, both accused were arrested and later on charged with the offence. Nothing was recovered. On 25.11.97 accused recorded a charge and caution statement, exhibit 1.

In his defence statement which was unsworn, the 1st accused described the day of his arrest. He said that on 21.10.97 while he slept G.S.U. officers went to his house, woke him up and conducted a search. They picked up a radio for which the accused appellant had not taken up a permit. He was arrested for it and charged later with the offence of robbery. On 22.10.97 he was interrogated about the robbery but he denied knowledge. But on 23.10.97 when he was interrogated again and further denied, he was beaten up by the Police severely, which incident was repeated on 24.10.1997. On 25.10.1997, the appellant claimed that he was threatened by Inspector Ibrahim with death while being further severely beaten and threatened with a pistol. That is when he succumbed and signed a prepared statement, purely under the fear of being killed. He denied committing the offence charged as he claimed to have been at his house sleeping. This story was supported by the statement of the second accused in the lower court, who on oath claimed that in the same night, having been arrested by G.S.U. officers on raids, ended up in the appellant's house where they woke him up, searched the house and arrested him too and was with him also charged for this offence. The said 2nd accused in the lower court also stated that he was not arrested in the appellant's house. The said 2nd accused was critically questioned by the Court Prosecutor of other criminal cases which were apparently pending in other courts. He admitted that he and the appellant were accused persons – in one of the cases pending in another court. This came under cross-examination by the

Prosecutor.

The main evidence in this case came from the complainant. All other witnesses were Police Officers being the one who received the report, from the complainant, the one who charged and cautioned the accused person and the one who escorted the accused for the taking of the charge and caution statement.

The trial Magistrate considered the evidence from both sides but chose to believe the prosecution evidence. The first question is whether the evidence as adduced was such that it could be held credible and could support a conviction. The complainant admitted that the attackers ordered him and his wife to lie beneath the bed. They obeyed. They were threatened to be killed if they did not continue lying there. The attackers had pangas, bows and arrows. PW.1 does not in his evidence claim that he dared stand from there as long as the attackers continued to be in the house. Unless the witness decided to dare the attackers which he has not claimed to have done, the logical conclusion would be that neither he nor his wife would stand up until they were sure the attackers had left the house. Furthermore, there was no light in the house except a torch claimed to be carried by one of the robbers. It is not claimed in the evidence that light from the torch was strong or that it was being used in a steady manner to enable a frightened man below the bed to use it to recognize or identify the attackers. He claimed to have seen the robbers when he got up. But how could this be so when the most likely thing is that they stood up only when the attackers had gone? The complainant admitted that he could not see what the attackers were stealing until they had left. It is not believable therefore that he clearly saw the robbers as he lay beneath the bed as he claimed. Even with a chance with the torch light, it is not easy to identify people under such harsh conditions such as must have prevailed in the complainant's house on the relevant night. It is noted that the complainant claims to have known the appellant well before that night. If this were to be believed it would be expected that his description of the attacker to the police would be better than the very vague description that he actually gave to the police. It is also intriguing for the complainant to claim that he recognized the appellant when at one stage he claims he was lying beneath the bed throughout and the next moment he claims that the robber who threatened him, who ended up being identified as the appellant, stood next to the complainant to give him an opportunity to identify the attacker as that is what he claimed..

Other issues arising include the fact that the complainant claimed that neither him nor his wife were injured during the attack, and yet when he reported to PW.2, a Police Officer on duty, he reported that he had been injured.

We find the evidence on the record to be very weak, very unreliable and sufficiently contradicting in certain material aspects as to be incapable of being the basis of a safe conviction.

There are also other aspects of this case that we find we cannot support. The appellant was arrested on 22.11.97, about 38 days after the incident occurred. There is no explanation in the evidence on the record as to why it took so long to arrest the appellant who the complainant claimed on the record to know well before the attack and one whom the complainant claimed to have clearly identified on the material night. Secondly, the necessity to hold an identification parade in the circumstances of this case cannot be over-emphasized. And yet none was arranged even when it is on the record that the complainant claimed that he could identify one of the attackers before the suspect was picked. In our view this set the prosecution to rely on dock evidence which we hold is in this case to be worthless. The omission to hold a police identification parade was, in our opinion, also fatal to the conviction, especially when there is no other independent reliable evidence on the record. Thirdly, the trial court allowed the prosecutor to cross-examine the 2nd accused on evidence touching other criminal cases lying in other courts which tended to establish that the appellant and his coaccused in the lower court were generally criminals. There is no reason why this kind of evidence which was introduced by the prosecution was allowed in the record. Put in another way, it cannot be ruled out that the introduction of this kind of evidence into the record by the prosecution did not prejudice the appellant.

Fourthly, it is clear from the record that the trial court admitted the charge and caution statement from the appellant. The statement was recorded after a period of about 4 days after his arrest and the appellant retracted the statement by stating that he was forced to sign or thumb-print it. The statement's

voluntariness was investigated by the court through a trial within a trial. Although the trial Magistrate finally admitted it in evidence, it nevertheless required corroboration in some material particulars. It behoved the trial Magistrate to warn herself of the danger of relying on the statement to convict. She should have then sought for the necessary corroboration. If she found it in the evidence she would point it out and proceed to rely on it to convict. If however she failed to get it she would nevertheless have been entitled to rely on the statement to convict if she was fully satisfied that the confession was voluntary and true.

In this case the trial Magistrate failed to warn herself of the danger of relying on a retracted confession or admission to convict without corroboration. She failed to look for independent corroborating evidence. She failed to weigh the evidence of the complainant as evidence of a single witness before relying on it to convict. She relied on the retracted confession which itself required corroboration to supply corroboration to a single identifying witness's evidence which also equally required corroboration.

It is therefore our finding, in conclusion, that even if we had accepted the prosecution facts and evidence, the charge of robbery with violence could not have been left to stand on the basis of law aforementioned. We accordingly quash the conviction of the trial court and set aside the sentence of death. The appellant is hereby set at liberty forthwith unless lawfully detained in prison for any other cause. It is so ordered.

Dated and delivered at Mombasa this 12th day of September, 2002.

D. A. ONYANCHA

J U D G E

J. KHAMINWA

COMMISSIONER OF ASSIZE